APPENDIX.

I. The Statutes Involved—Title 22 of the United States Code:

Sec. 23f. Board of Foreign Service Personnel for Foreign Service; establishment; duties; recommendation of promotions; composition. There shall be in the Department of State a Board of Foreign Service Personnel for the Foreign Service, whose duty it shall be to recommend promotions in the Foreign Service and to furnish the Secretary of State with lists of Foreign Service officers who have demonstrated special capacity for promotion to the grade of minister. The board shall be composed of not more than three Assistant Secretaries of State, one of whom shall be the Assistant Secretary of State having supervision over the Division of Foreign Service Personnel, who shall be chairman. The Chief of the Division of Foreign Service Personnel and one other member of the division may attend the meetings of the board and one of them shall act as secretary, but they shall not be entitled to vote in its proceedings. (May 24, 1924, c. 182, as amended Feb. 23, 1931, c. 276, Sec. 31, 46 Stat. 1214.)

Sec. 23g. Division of Foreign Service Personnel; assignment of Foreign Service Officers for duty in Division; effect of assignment on eligibility for promotion; nature of duty. No Foreign Service officer below class I shall be assigned for duty in the Division of Foreign Service Personnel. Foreign Service officers assigned to the division shall not be eligible for recommendation by the Board of Foreign Service Personnel for promotion to the grade of minister or ambassador during the period of such assignment or for three years thereafter, nor shall such officers be given any authority except of a purely advisory character, over promotions, demotions, transfers, or separations from the service of Foreign Service officers. (May 24, 1924, c. 182, as amended Feb. 23, 1931, c. 276, Sec. 31, 46 Stat. 1214.)

Sec. 23h. Same; duties; custodian of information affecting Foreign Service officers; efficiency ratings; recom-

mendations for promotion; confidential character of correspondence and records.

The Division of Foreign Service Personnel shall assemble, record, and be the custodian of all available information in regard to the character, ability, conduct, quality of work, industry, experience, dependability and general availability of Foreign Service officers, including reports of inspecting officers and efficiency reports of supervising officers. All such information shall be appraised at least once in two years, and the result of such appraisal expressed in terms of excellent, very good, satisfactory, or unsatisfactory, accompanied by a concise statement of the considerations upon which they are based, shall be entered upon records to be known as the efficiency records of the officers, and shall constitute their efficiency ratings for the period. No charges against an officer that would adversely affect his efficiency rating or his value to the service, if true, shall be taken into consideration in determining his efficiency rating except after the officer shall have had opportunity to reply thereto. The Assistant Secretary of State supervising the Division of Foreign Service Personnel shall be responsible for the keeping of accurate and impartial efficiency records of Foreign Service officers and shall take all measures necessary to ensure their accuracy and impartiality. Not later than November 1 at least every two years, the Division of Foreign Service Personnel shall, under the supervision of the Assistant Secretary of State, prepare a list in which all Foreign Service officers shall be graded in accordance with their relative efficiency and value to the service. In this list officers shall be graded as excellent, very good, satisfactory, or unsatisfactory with such further sub-classification as may be found necessary. All officers rated satisfactory or above shall be eligible for promotion in the order of merit to the minimum salary of the next higher class. This list shall not become effective in so far as it affects promotion until it has been considered by the Board of Foreign Service Personnel hereinbefore provided for and approved by the Secretary of State: *Provided*, That this list shall not be changed before the next succeeding list of ratings is approved except in case of extraordinary or conspicuously meritorious service or seri-

ous misconduct and any change for such reasons shall be made only after consideration by the Board of Foreign Service Personnel and approval by the Secretary of State, and the reasons for such change when made shall be inscribed upon the efficiency records of the officers affected. From this list of all Foreign Service officers recommendations for promotion shall be made in the order of their ascertained merit within classes. Recommendations shall also be made, in order of merit, as shown by ratings in the examinations for appointment to the unclassified grade, with commissions also as diplomatic secretaries and vice consuls, of those who have successfully passed the examinations. All such recommendations shall be submitted to the Secretary of State for his consideration and if he shall approve, for transmission to the President.

The correspondence and records of the Division of Foreign Service Personnel shall be confidential except to the President, the Secretary of State, the members of the Board of Foreign Service Personnel, the Assistant Secretary of State supervising the division, and such of its employees as may be assigned to work on such correspondence and records. (May 24, 1924, c. 182, as amended Feb. 23, 1931, c. 276, Sec. 32, 46 Stat. 1214.)

Sec. 23i. Separation of Foreign Service officers from Foreign Service; grounds, retirement pay; annuities and bonuses.

The President is hereby authorized to establish by Executive order, regulations providing for the separation of Foreign Service officers from the Foreign Service, in accordance with the conditions hereinafter prescribed. Any Foreign Service officer so separated from the Foreign Service shall be retired from the Service, after a hearing by the Secretary of State, upon an annuity equal to 25 per centum of his salary at the time of retirement, in the case of an officer over forty-five years of age, or in the case of an officer under forty-five years of age with a bonus of one year's salary at the time of his retirement, either annuity or one year's salary to be payable out of the Foreign Service retirement and disability fund and except as herein provided, subject to the same provisions and limitations as other annuities payable out of such fund; but no

return of contributions shall be made under paragraph (1) of section 21 of this title in the case of any Foreign Service officer retired under the provisions of this section: *Provided, however,* That any officer entitled to the bonus of one year's salary will receive in lieu of such bonus the amount of his contributions and interest under paragraph (1) of section 21 of this title if such amount exceeds one year's salary. Whenever it is determined that the efficiency rating of an officer is unsatisfactory, thereby meaning below the standard required for the service, and such determination has been confirmed by the Secretary of State, the officer shall be notified thereof, and if, after a reasonable period to be determined by the circumstances in each particular case, the rating of such officer continues to be found unsatisfactory and such finding is confirmed by the Secretary of State after a hearing accorded the officer, such officer shall be separated from the service with the annuity or bonus provided in this section, but no officer so separated from the service shall receive the said annuity or bonus unless at the time of separation he shall have served at least fifteen years. He shall, however, if he has not served at least fifteen years, have returned to him the full sum of his contributions to the annuity fund, with interest thereon at 4 per centum compounded annually, except as provided in paragraph (c) of section 4 of this Act. The benefits of this section, except, at the option of the Secretary of State, the return of an officer's contributions to the annuity fund, shall not be given to Foreign Service officers separated from the Foreign Service on account of malfeasance in office. (May 24, 1924, c. 182, as amended Feb. 23, 1931, c. 276, Sec. 33, 46 Stat. 1215; Apr. 24, 1939, c. 84, Sec. 4, 53 Stat. 588.)

II. **Regulations Involved—Taken from "The Code of Federal Regulations of the United States of America" (June 1, 1938)—Title 22, Foreign Relations:**

SECTION 76.1. *Definition.* "Foreign Service officer" shall be deemed to denote permanent officers of the Foreign Service below the grade of minister.

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SECTION 76.3. *Examination for the Foreign Service.* There is hereby constituted a board of examiners, which shall conduct examinations to determine the eligibility of the candidates for the Foreign Service, composed as follows: Three Assistant Secretaries of State to be designated by the Secretary of State, the Chief of the Division of Foreign Service Personnel, and the Chief Examiner of the Civil Service Commission. Members of the board of examiners may, when necessary, designate other persons to serve for them on the board. The following rules are established for the conduct of examinations:

(a) It shall be the duty of the board of examiners to formulate rules for and hold examinations of applicants for commission to the Foreign Service and to determine from among the persons designated by the President for examination those who are fitted for appointment.

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(c) The examinations shall be both written and oral, * * *

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(f) No one shall be certified as eligible for appointment who

(1) Is under 21 or over 35 years of age * * *

(2) Has not been a citizen of the United States for at least 15 years before the date of certification;

(3) Is not of good character and habits;

(4) **Is not physically, mentally, and temperamentally qualified for the proper performance of the duties of the Foreign Service;**

(5) Has not been specially designated by the President to take the prescribed examinations to determine eligibility for appointment.

(g) Upon the conclusion of the examinations, the names of the candidates who shall have attained upon the whole examination the required rating will be certified by the board to the Secretary of State as eligible for appointment.

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(k) New appointments to the service shall be to the grade of Foreign Service officer, unclassified, and no promotions to a higher grade shall be made except in conformity with law and regulations with respect thereto (§§ 76.2, 76.6, 76.7). This provision does not apply to reinstatements or transfers from the Department of State under Section 12 of the Act of February 23, 1931.

SECTION 76.6. [Among the duties of the Board of Foreign Service Personnel is the following:]

(f) To consider controversies and delinquencies among the service personnel and to recommend to the Secretary of State appropriate disciplinary action where required.

(g) To determine, for submission to the Secretary of State after considering recommendations of the Division of Foreign Service Personnel, that the efficiency rating of an officer is unsatisfactory, thereby meaning below the standard required for the service, in order that the Secretary of State may take appropriate action with respect to the separation from the Foreign Service of such unsatisfactory officers in accordance with law (see §§ 76.9, 78.45).
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The members of the board, individually and collectively, shall have authority to examine all records and data of the Division of Foreign Service Personnel. (Sec. 32, 46 Stat. 1214; 22 U. S. C. 23h.)

All action taken by the board shall be strictly nonpartisan and based exclusively upon the records and ratings of efficiency of the officers concerned.

The proceedings of the board shall be strictly confidential, but the chairman shall, within a reasonable time prior to meetings of the board for considering and submitting to the Secretary of State the rating lists from which promotions will be made in accordance with Section 32 of the Act of February 23, 1931 (46 Stat. 1214; 22 U. S. C. 23h), invite the Chairman of the Senate Committee on Foreign Relations and the Chairman of the House Committee on Foreign Affairs, or some committee member designated by the

chairman, to sit with the board through its deliberations without, however, participating in its decisions.

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SECTION 76.8. *Foreign Service officers' training school.* There is hereby established in the Department of State a Foreign Service officers' training school for the instruction of new appointees.

The Foreign Service officers' training school shall be under the direction of a board composed of the following members, to wit: The Assistant Secretaries of State composing the Board of Foreign Service Personnel, one Foreign Service officer assigned for duty in the Division of Foreign Service Personnel, and the director of the Foreign Service officers' training school. The board will act in all matters with the approval of the Secretary of State.

The director of the school shall be selected by the other members of the school board from among the officers of the Foreign Service, with the approval of the Secretary of State.

Instructors shall be selected from among the qualified officers of the Department of State, the Foreign Service, other executive departments of the Government, and any available sources, in the discretion of the school board.

The term of instruction in the Foreign Service officers' training school shall be considered a period of probation during which the new appointees are to be judged as to their qualifications for advancement and assignment to duty. At the end of the term, recommendations shall be made to the Secretary of State by the Board of Foreign Service Personnel for the dismissal of any who may have failed to meet the required standard of the service.

The Secretary of State is authorized to prescribe rules and regulations for the governance of the Foreign Service officers' training school.

SECTION 76.9. *Separation from the service.* Whenever it is determined that the efficiency rating of an officer is unsatisfactory, thereby meaning below the standards required for the service, *and such determination has been confirmed by the Secretary of State after notice and hearing as pro-*

vided by law, such officer shall be separated from the service in accordance with the provisions of § 78.45.

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SECTION 78.45. *Involuntary separation from service.* The Secretary of State is hereby authorized to promulgate rules of procedure for the separation of Foreign Service officers from the Foreign Service, in accordance with the conditions hereinafter prescribed, and also to take all measures necessary to insure equitable administration thereof, in conformity with the purposes of section 33 of the Act of February 23, 1931. Foreign Service officers so separated from the Foreign Service shall be retired from the service, after a hearing by the Secretary of State, upon an annuity * * *. * * * Whenever it is determined that the efficiency rating of an officer is unsatisfactory, thereby meaning below the standard required for the service, and such determination has been confirmed by the Secretary of State, the officer shall be notified thereof; and if, after a reasonable period to be determined by the circumstances in each particular case, the rating of such officer continues to be found unsatisfactory and such finding is confirmed by the Secretary of State after a hearing accorded the officer, such officer shall be separated from the service with the annuity or bonus provided in this section * * *.

[Since the above regulations the only further regulations promulgated on these points by either the President or the Secretary of State are contained in the Executive Order of April 20, 1940, 5 Federal Register 1461-1464 inclusive, for April 20, 1940. The only applicable provision as to separations from the Service is the following:]

I-28. *Involuntary separation from Service.* A Foreign Service Officer may be separated from the Foreign Service in accordance with the provisions of Section 33 of the Act of February 23, 1931, 46 Stat. 1215, as amended by Section 4 of the Act of April 24, 1939, 53 Stat. 588 (22 U. S. C., Supp. V, Sec. 23i), and such administrative rules and regulations not inconsistent therewith as may be prescribed by the Secretary of State.

[According to official information conveyed by the office of the Secretary of State to the Director of the Federal Register no such administrative rules and regulations have ever been promulgated by the Secretary of State.

It may be pointed out that under I-5(d) of the same Executive Order, there is the following provision:]

(d) *Probationary Period of New Appointees to the Classified Foreign Service.* New appointees to the classified Foreign Service of the United States shall serve, at such time and for such duration as the Secretary of State may determine, a period of probation in the Foreign Service Officers' Training School herein established.

[This provision plaintiff fully complied with and passed out of his probationary status in June, 1940, and was promoted further in the Foreign Service on August 1, 1940 (Appellant's App. 3).]

[Under date of July 5, 1939, by Executive Order the President added the following provisions to the regulations making leave of absence a *matter of right* subject to regulations to be promulgated by the Secretary of State, which regulations have never yet been promulgated:]

IV-11

Leaves of absence; Officers and employees of the Foreign Service may avail themselves of statutory leave subject to regulations prescribed by the Secretary of State governing the granting of such leave.